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The Rights of Foster Parents to the Children In Their Care

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NOTES AND COMMENTS

THE RIGHTS OF FOSTER PARENTS TO THE CHILDREN IN THEIR CARE

I. INTRODUCTION

> Foster family care is the child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period, and when adoption is neither desirable nor possible. The distinctive component of foster family care is the development and use of the foster family home to provide substitute family life experiences, together with casework and other treatment services for both the child and his parents.[1]

The practices and approach of the past regarding foster care have had a direct bearing on the present concept and resulting problems in this field. Foster care was originally conceived of as a temporary custodial arrangement. Children were placed in foster homes when their parents were unable to properly care for them, usually for reasons of abandonment, neglect, abuse, or financial disability. Experience revealed that the separation of children from their natural parents had very harmful effects, so the field of child welfare directed its efforts toward recognizing parental rights and responsibilities and toward rehabilitating the parent-child relationship while the child was in a foster home. "Concerted attention was given to preventing foster care from aimlessly going on indefinitely. . . . [A] widely prevailing belief developed that foster care must not be a way of life for children—it should be 'temporary.' "[2]

Over the years, there has been a steady increase in the number of children in foster care[3] accompanied by a definite shortage of child welfare facilities and services. Agencies have become overworked and understaffed and as a result have not been able to maintain sufficient contact between foster children and their natural parents which is essential for family rehabilitation and reunification. When a child is removed from his parents by court order and placed in foster care, the case is periodically reviewed by the court

1. Child Welfare League of America, Standards for Foster Family Care Service 5 (1959).

2. Smith, *Permanent Or Long-Term Foster Family Care*, 43 Child Welfare 192 (1962).

3. In 1968 there were approximately 316,000 children in foster care in the United States. 240,000 of these were in foster family care, and 75,000 were in institutions. U.S. Dep't of Health, Education, and Welfare, Child Welfare Statistics 29 (1968).

to determine whether the child should be returned to his parents. The court relies on the agency's report of the progress of the parent-child relationship. However, all too often the agency has not been able to attempt rehabilitation of the family and is not able to submit an accurate case report to the judge. The result may be either that the child remains in a foster home for an indefinite period or that he is reunited with his natural parents before he or they are psychologically and emotionally prepared for it.

There are an increasing number of children today who will never be returned to their natural parents and never be adopted, consequently requiring permanent or long-term foster care.[4] Foster parents often are the only real family these children have ever known, providing them with the stability and affection necessary for healthy emotional development. To move these children from one foster home to another, or to return them to natural parents who are unfit, can be extremely detrimental. It therefore seems imperative to afford more rights to foster parents in addition to the duties they already possess,[5] so that they might retain custody of the children in their care and provide them with the benefits of family life.

II. Foster Parents and Their Present Statutory Rights in Illinois

"[Foster] status most commonly arises when a court awards guardianship and custody of a child to a child welfare agency which in turn delegates the parental role to persons chosen by the agency."[6] This status may arise in other ways, such as when a court awards guardianship and custody to someone other than the natural parents, usually a relative. It also includes

4. Lewis, *Foster-Family Care: Has It Fulfilled Its Promise?*, 355 The Annals 31, 36 (1964).

> Do the children return home or move into adoptive homes? All of the evidence indicates that permanent homes are not being achieved for most children in foster-family care. Maas and Engler [Children in Need of Parents 350 (1959)], on the basis of their study of all children in foster care in nine different communities of various size, geographical location, and cultures, predicted that better than half the children in foster care at the time of the study would live "a major part of their childhood in foster families and institutions." . . . The Children's Bureau found that 58 percent of the children in foster care under the auspices of public agencies had had more than one placement; of this group, 16 per cent had had four or more placements, and "in the rare case the child had been placed 22 times!" Do they maintain close and meaningful ties with their own parents? Again the answer must be "no". Maas and Engler found that in approximately half of the cases parents visited infrequently or not at all.

5. [T]he legal rights and duties of foster parents are determined by the common law doctrine of *in loco parentis*. Under this doctrine, persons holding themselves out as parents are held to similar, and often the same, standards as natural parents. Courts use the *in loco parentis* doctrine to impose on foster parents the same responsibilities as natural parents with respect to providing their children with proper health, education, and environment conducive to the development of sound moral character.

Katz, *Legal Aspects of Foster Care*, 5 Fam. L.Q. 283, 285-86 (1971). *See also*, Schneider v. Schneider, 25 N.J. Misc. 180, 52 A.2d 564 (1947).

6. Katz, *supra* note 5, at 285.

persons who are given custody of a child prior to a final adoption decree, and those who believe themselves to be adoptive parents, relying on an adoption decree which is actually legally defective. Finally, a person may be considered a foster parent if he cares for another's child through a formal or informal arrangement, or if he voluntarily cares for a foundling. Illinois courts have defined a foster parent as, "one who has performed the duties of a parent to the child of another by rearing the child as his own child."[7]

Aside from the large institutions run by various child welfare agencies, there are many different types of foster family homes. The Illinois Department of Children and Family Services maintains five types: the emergency or receiving home receives children needing immediate help who only stay a short time; the special needs home takes the mentally or physically handicapped, young unmarried mothers, children who have had many previous placements, or others with special problems; the infant home receives babies released for adoption, who stay only until an adoptive home is found; the temporary home keeps children for a short observation period until permanent placements can be arranged; and the long-term foster home cares for children until they can return to their own families or until they reach adulthood. It is the latter type of foster family that needs more legal rights so that such children are not suddenly taken out of the only home they may have ever known and placed in a foreign environment.[8] The displacement of these foster children can produce permanent emotional problems,[9] and all too often the law disregards what is best for the children.

At the present time, foster parents in Illinois and elsewhere enjoy almost no rights with respect to their foster children. Under the Illinois Juvenile Court Act, foster parents are not made parties to nor given notice of any proceedings concerning their foster children, although they do have a right to be heard.[10] This renders them practically powerless to fight for the custody of the children.

Possible reasons for foster parents' lack of rights could be the persistence

7. People v. Parris, 130 Ill. App. 2d 933, 936, 267 N.E.2d 39, 42 (1971).

8. J. Bowlby, Attachment and Loss (1969).

9. [A] twenty month old boy was driven away from his home to a strange man's office; there he met another strange man who took him away to a strange house with a strange woman and strange children to greet him, to be put to bed in a strange cot in a strange room. This man is his 'natural' father and there he must stay, leaving behind what is at present a conscious memory, but will soon become an unconscious but nevertheless real memory of all that meant his life and made sense to him about himself.

Lawson, *Adoption Law and Child Care*, 116 New L.J. 633 (1966).

10. The pertinent section reads as follows:

Though not appointed guardian or legal custodian or otherwise made a party to the proceeding, any foster parent or representative of an agency or association interested in the minor has the right to be heard by the court but does not thereby become a party to the proceeding.

Ill. Rev. Stat. ch. 37, § 701-02(2) (1971). The only other right given to a foster parent under Illinois law is that he may petition the court for a change in the custody of the child in his care. Ill. Rev. Stat. ch. 37, §§ 705-8(2) (1971).

of the original concept that they were merely temporary custodians, which, in most instances, is no longer the case today.[11] Another explanation could be that there is a deliberate legislative intent to keep their participation at a minimum to prevent interference with parental rights. It is apparent that such curtailment of the legal standing of foster parents, accompanied by the view taken by some courts that the rights of natural parents and agencies are always paramount over the rights of foster parents, often results in disregard of the best interests and wishes of the child. In addition to the possible harmful effects on the child as a result of foster parents' lack of rights,[12] the threat of the impermanence of the foster relationship can have damaging effects on the foster family itself.

> The nonrelatedness of the child and the foster parents (with the corollary of impermanence) means that the child does not share the past, and presumably the future, of the foster family. The child comes with different values, different behaviors, and with close ties to another family. It is not clear what continuing demands are made on the foster family and the child in learning to live together, to trust, and to love each other. This is particularly true in the placement that goes on and on, without termination but also without the assurance of permanence. Can these families and children fully share the joys of common goals and aspirations? Can they enter fully into parent-child relationships, or must there always be some holding back?[13]

III. Natural Parents Versus Foster Parents

Courts are generally reluctant to award the custody of children to someone other than the natural parents,[14] except in cases involving children who are clearly abused, neglected, or abandoned. Many courts have adopted the rule that in custody disputes between a parent and a third person, the parent has a paramount right to custody unless he is shown to be unfit, which is often difficult to prove under the existing statues.[15] However, under a more

11. Lewis, *supra* note 4, at 37. *See also,* Glover & Reid, *Unmet and Future Needs,* 355 The Annals 9 (1964).

12. For significantly large proportions of children in foster care, what was meant to be a temporary plan was permitted to drift, so that the original intent was not carried out. Many of these children, having been placed and replaced, began to act up and soon (even if legally available) were neither adoptable nor able to get along in foster homes.
Kahn, *Child Welfare: Trends and Directions,* 41 Child Welfare 459, 469 (1962).

13. Lewis, *supra* note 4, at 40.

14. The starting point . . . is the obvious but often overlooked principle that in the going family the parents are entitled to the custody of their children. . . . One reason for this is the firmly held belief that . . . parents will generally be more successful in caring for their children than strangers or agencies of the state. There is also the traditional conviction that the profound and elemental emotional ties between parent and child should be respected by the state although the child might have greater material advantages and perhaps might receive better care in the custody of someone else.
H. Clark, The Law of Domestic Relations in the United States 591 (1968).

15. *See, for example,* the grounds of parental unfitness defined in the Illinois

enlightened approach, some states (including Illinois) have adopted the view that the controlling consideration in such cases should be the best interest of the child.[16] In the leading case of *Giacopelli v. Florence Crittenton Home*[17] the Illinois Supreme Court articulated the rule as follows:

> It is always recognized that a natural parent has a superior right to the custody of his child. That right, however, is not absolute and must yield to the best interest of the child. Such superior right only obtains when it is in accord with the best interest of the child. [citations omitted] The parent need not be shown to be totally unfit to rear the child in order to deny to him the custody of the child. Fitness of the parent is only one of the factors to be considered in determining how the best interest of the child may be served. The sufficiency of the parents' home, its surroundings, and all other matters that have a bearing upon the welfare of the child are to be considered. [citation omitted] The parents' natural rights must give way to the welfare and best interest of the child. [citations omitted][18]

However, there was a divergence of views in the *Giacopelli* case and three justices concurred in the result only because they found sufficient evidence of the parents' unfitness. As a result, the law in Illinois continued to fluctuate[19] until the supreme court finally settled the conflict in *People ex rel. Edwards v. Livingston.*[20] This case, involving a habeas corpus action by the father of the child against the grandfather, ended the uncertainty in Illinois custody law by holding that a natural parent may be deprived of the custody of his child without a finding of unfitness. "The best interest of the child is the standard and it is not necessary that the natural parent be found unfit or be found to have legally forfeited his rights to custody, if it is in the best interest of the child that he be placed in the custody of someone other than the natural parent."[21]

A recent application of this rule is the 1972 case of *People v. Hoerner.*[22]

Adoption Act, Ill. Rev. Stat. ch. 4, § 9.1-1 (1971). However, in Illinois proof of unfitness is not necessary in custody cases and is required only in adoption cases which seek to terminate parental rights.

16. For a history of Illinois case law leading to the adoption of this view, *see* Veverka, *The Right of Natural Parents to Their Children as Against Strangers: Is the Right Absolute?*, 61 Ill. B.J. 234 (1973).

17. 16 Ill. 2d 556, 158 N.E.2d 613 (1959).

18. *Id.* at 565-566, 158 N.E.2d at 618.

19. Mackie v. Mackie, 88 Ill. App. 2d 61, 232 N.E.2d 184 (1967); Robinson v. Neubauer, 79 Ill. App. 2d 362, 223 N.E.2d 705 (1967); Sholty v. Sholty, 67 Ill. App. 2d 60, 214 N.E.2d 15 (1966); People *ex rel.* Pace v. Wood, 50 Ill. App. 2d 63, 200 N.E.2d 125 (1964); McAdams v. McAdams, 46 Ill. App. 2d 294, 197 N.E.2d 93 (1964); Houston v. Brackett, 38 Ill. App. 2d 463, 187 N.E.2d 545 (1963); Campbell v. Fisher, 28 Ill. App. 2d 454, 171 N.E.2d 810 (1961).

20. 42 Ill. 2d 201, 247 N.E.2d 417 (1969).

21. *Id.* at 209, 247 N.E.2d at 421. Although the grandparent was given custody, the court decided that it was in the child's best interest to award him temporary custody only, considering his age (76), the fact that the father had had custody pending appeal, and the lack of a woman in the grandfather's house.

22. 6 Ill. App. 3d 994, 287 N.E.2d 510 (1972).

The children in this case had been adjudged neglected and were made wards of the court. They were placed in foster homes where they adjusted very well. Thereafter the parents attempted to regain custody by showing that they had reformed and had improved their living habits. The Illinois Supreme Court gave great weight to the facts that the children had been in stable family situations for several years in the foster homes and that they had overcome the behavioral problems which were manifest when they were removed from their natural parents. The court also considered expert testimony to the effect that removal from their present homes would have severely detrimental emotional effects on the children. While recognizing the natural parents' genuine determination to do better, the court stated that, "the true prospects are at best tenuous,"[23] and held that the best interests of the children would be served by allowing them to remain with the foster parents. The court concluded its opinion with a quote from the *Giacopelli* case: "We cannot uproot the child from an adoptive home full of love, care, and opportunity, for the sole and only purpose of placing him with his natural parents."[24]

Thus, it appears that Illinois, as well as other states,[25] has adopted a more realistic approach to the custody dispute problem between parents and foster parents. Recognizing thereby that the paramount consideration should be the best interest of the child, rather than the traditional presumption that the natural parent is entitled to custody unless found to be unfit.[26] Where the child's welfare is the controlling question, the following factors are usually taken into account: the character and past conduct of the parents; the circumstances in which the child would live; the child's preference if he is old enough to make a rational choice; the length of time the child has been in the custody of the foster parents; the nature of his relationship to them, and the degree of contact maintained with the natural parents.[27] Al-

23. *Id.* at 998, 287 N.E.2d at 512.

24. *Id.*

25. Cases in other states which have held the child's best interest to be the controlling test include: Evans v. Wilkes, 48 Ala. App. 363, 265 So. 2d 145 (1972); *In re* One Minor Child, 254 A.2d 443 (Del. 1969); *In re* McClasson, — Iowa —, 195 N.W. 2d 116 (1972); Halstead v. Halstead, 259 Iowa 526, 144 N.W.2d 861 (1966); Chapsky v. Wood, 26 Kan. 650 (1881); Cummins v. Bird, 230 Ky. 296, 19 S.W.2d 954; *In re* Cole, 265 So. 2d 835 (La. App. 1972); Grover v. Grover, 143 Me. 34, 54 A.2d 637 (1947); Wilkins v. Wilkins, 324 Mass. 261, 85 N.E.2d 768 (1949); State *ex rel.* Fisher v. Devins, — Minn. —, 200 N.W.2d 28 (1972); Commonwealth *ex rel.* Bendrick v. White, 403 Pa. 55, 169 A.2d 69 (1961); *In re* Guardianship of Palmer, 81 Wash. 2d 604, 503 P.2d 464 (1972).

26. Cases adhering to the parental unfitness rule include: Nolan v. Nolan, 240 Ark. 579, 401 S.W.2d 13 (1966); Roche v. Roche, 25 Cal. 2d 141, 152 P.2d 999 (1944); McGuire v. McGuire, 190 Kan. 524, 376 P.2d 908 (1962); *In re* Gibbons, 247 N.C. 273, 101 S.E.2d 16 (1957); Ludy v. Ludy, 84 Ohio App. 195, 82 N.E.2d 775 (1948). Some courts use a combination of the two tests, reasoning that there is a presumption that the child's welfare will best be served by giving custody to the natural parent. *See, e.g.*, LeRoy v. Odgers, 18 Ariz. App. 499, 503 P.2d 975 (1972).

27. Clark, *supra* note 14, at 593-94.

though not specifically articulated in any Illinois case, it may be that once a child has remained in a foster home for a long period of time, the rights of foster parents become stronger as opposed to those of natural parents. The following view should be adopted in Illinois:

> Foster parents may in fact enjoy the right to custody without benefit of the label. A de facto custodial interest develops in a foster parent when the foster relationship continues over a length of time. Courts are reluctant to interfere with this interest and, if they do interfere, the foster parent is generally entitled to notification and an opportunity to appear and defend his interest. A continuing foster relationship, if secure and orderly, is typically protected even against a natural parent's unreasonable intrustion. If a natural parent wishes to interfere with the foster parent relationship, he must as any other individual, carry the burden of proving the foster parent's unfitness, as well as the burden of showing that the child's needs will be served best by another custodial arrangement.[28]

A recent and much publicized Illinois case in the Will County Juvenile Court illustrates the dilemma faced by a court when parents demand the return of their children who have lived with a foster family for a long period.[29] In this case, the natural parents of two girls who had lived in a foster home for seven years succeeded in obtaining a court order removing the children from the foster parents. The girls, ages ten and twelve, were ordered to be placed in an orphanage for an unspecified time and were led from the courtroom kicking and crying. The orphanage was to be a "neutral setting" where they could establish ties with their natural parents, and meanwhile the foster parents were prohibited from visiting them. The girls had been taken away from their parents in 1966 following a finding of neglect. Although the court had a difficult decision to make, it appears that it may have been guided by the principle of parental rights rather than by the best interests of the children. The foster parents were the only family the girls knew, but they had no legal standing to challenge the removal of the children from their home. Because of the weakness of the law in this area, the children are the losers in such custody disputes.

IV. Termination of Parental Rights

In many instances when a child is placed in foster family care, the natural parent will maintain contact for a while and then gradually lose interest

28. Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of "the Best Interests of the Child" Doctrine*, 65 Mich. L. Rev. 145, 160 (1966). *See also,* In re Adoption of Cheney, 244 Iowa 1180, 59 N.W.2d 685 (1953); Cummins v. Bird, 230 Ky. 296, 19 S.W.2d 959 (1929); and State v. Knight, 135 So. 2d 126 (La. App. 1961).

29. Ross v. Reeves, No. W66F243J (Ill. Cir. Ct., March 9, 1973). *See,* Chicago Sun Times, March 12, 1973, § 1, at 20, col. 1; Chicago Tribune, March 13, 1973, § 1, at 9, col. 1; Chicago Daily News, March 14, 1973, § 1, at 3; Keegan, *Children Are Losers in Custody Battles,* Chicago Tribune, March 21, 1973, § 1C, at 6, col. 1.

until the only contact between parent and child is an occasional visit or gift. Even though he is unwilling or unable to reassume custody himself, the parent frequently will refuse to consent to the child's adoption by someone else (often the foster parents). Unless the natural parent's rights are terminated, the child is literally in limbo and is likely to be deprived of a permanent family.[30]

Three types of statutes are presently in force in various states dealing with this problem and allowing permanent termination of parental rights so that the child is free for adoption.[31] The first type dispenses with the required consent of the natural parent to the adoption of his child when such consent is withheld contrary to the best interests of the child.[32] The second type provides for the termination of the rights of a parent who has abandoned his child.[33] Some of these statutes, including Illinois', allow a court in an adoption proceeding to dispense with the requirement of the natural parent's consent if he has abandoned the child.[34] A few abandonment statutes provide, at least in theory, for a prior separate determination of the issue of abandonment and for the termination of all parental rights if abandonment is found.[35] These statutes generally specify other conduct besides abandonment as grounds for termination of parental rights and they usually contain a more detailed definition of abandonment. The third type of statute also provides that lack of parental care or attention can justify the permanent termination of parental rights. However, this statute requires that the termination take place in a proceeding separate from the adoption proceeding and omits the word "abandon". The New York permanent neglect statute[36]

30. *See, e.g.*, In re Clear, 58 Misc. 2d 699, 296 N.Y.S.2d 184 (1969), *rev'd per curiam sub nom.*, In re Klug, 32 A.D.2d 915, 302 N.Y.S.2d 418 (1969).

31. Gordon, *Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute*, 46 St. John's L. Rev. 215 (1971).

32. Ariz. Rev. Stat. Ann. § 8-106 (Supp. 1972); Md. Ann. Code art. 16, § 74 (1957), *as amended* (Supp. 1970); Va. Code Ann. § 63.1-225 (Supp. 1972).

33. Ala. Code tit. 27, § 3 (1958); Cal. Civil Code ch. 4, §§ 232, 233 (West Supp. 1970); Del. Code Ann. tit. 13, § 1103 (Supp. 1970); Fla. Stat. Ann. § 63.011 (1969); Ill. Rev. Stat. ch. 4, §§ 9.1-1, 9.8-8 (1971); Mont. Rev. Code Ann. tit. 61-205 (1970); Pa. Stat, Ann. tit. 1, § 1.2 (1963), *as amended* (Supp. 1970); Tenn. Code Ann. §§ 36-102, 39-110 (Supp. 1969); Vt. Stat. Ann. tit. 15, § 435 (1958); Wis. Stat. Ann. § 48.40 (1957), *as amended* (Supp. 1973).

34. Ala. Code tit. 27, § 3 (1958); Ill. Rev. Stat. ch. 4, §§ 9.1-1, 9.1-8 (1971); Vt. Stat. Ann. tit. 15, § 435 (1958).

35. Cal. Civil Code ch. 4, §§ 232, 233 (West Supp. 1970); Del. Code Ann. tit. 13, § 1103 (Supp. 1970); Pa. Stat. Ann. tit. 1, § 1.2 (1963), *as amended* (Supp. 1970); Wis. Stat. Ann. § 48.40 (1957), *as amended* (Supp. 1973).

36. N.Y. Fam. Ct. Act §§ 611, 634 (McKinney 1963). The core provisions appear as follows:

> Sec. 611. Permanently neglected child
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> A "permanently neglected child" is a person under eighteen years of age who has been placed in the care of an authorized agency, either in an institution or in a foster home, and whose parent or custodian has failed for a period of more than one year following the placement or commitment of such child in the care of an authorized agency substantially and continuously or repeatedly

represents this third type and is believed to afford a better solution to the problems of children in long-term foster care than do the best interest and abandonment statutes.

> Best interest and abandonment statutes are encumbered by a thick gloss of restrictive constructions, and, because petitions under them are usually brought as part of the adoption proceeding, the statutes can lead to unfairness and confusion. Statutes speaking more directly to indefinite foster placements and requiring a prior, separate proceeding to terminate the parent's rights are more suitable to the task.[37]

By omitting the words "abandon" and "best interests", the New York statute avoids judicial interpretation of these terms. The statute applies directly to the situation of the parent who deserts his child in long-term foster care, and defines specific conditions which will allow a court to sever parental rights permanently.

Under the Illinois statute, a parent's consent to adoption is not required if the parent is found to be unfit.[38] The grounds of unfitness, in addition to abandonment (which is undefined), include: failure to maintain a reasonable degree of interest, concern, or responsibility for the child's welfare; substantial neglect of the child if continuous or repeated; depravity; open and notorious adultery or fornication; habitual drunkenness for one year; extreme and repeated cruelty to the child; desertion of the child for more than three months; or other neglect or misconduct toward the child.[39] Illinois courts have generally been reluctant to find abandonment or desertion in cases seeking to declare a parent unfit and clear and definite proof is required in such cases.[40]

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to maintain contact with and plan for the future of the child, although physically able to do so, notwithstanding the agency's diligent effort to encourage and strengthen the parental relationship. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court.

Sec. 614. Originating proceeding permanently to terminate custody

A proceeding permanently to terminate the parent's or other custodian's custody of a child is originated by a petition, alleging:

(A) the child is a person under eighteen years of age;

(B) the child has been placed in the care of an authorized agency, either in an institution or in a foster home;

(C) the authorized agency has made diligent efforts to encourage and strengthen the parental relationship and specifying the efforts made;

(D) the parent or custodian, notwithstanding the agency's efforts, has failed for a period of more than one year following the placement or commitment of such child in the care of an authorized agency substantially and continuously or repeatedly to maintain contact with and plan for the future of the child although physically and financially able to do so; and

(E) the moral and temporal interests of the child require that the parents' or other custodian's custody of the child be terminated permanently.

37. Gordon, *supra* note 31, at 260.

38. Ill. Rev. Stat. ch. 4, § 9.1-8 (1971).

39. Ill. Rev. Stat. ch. 4, § 9.1-1 (1971).

40. Petition of Smith, 4 Ill. App. 3d 261, 280 N.E.2d 770 (1972); Robinson v. Neubauer, 79 Ill. App. 2d 362, 223 N.E.2d 705 (1967); Carlson v. Oberling, 73 Ill.

The termination of parental rights may be even more difficult in cases involving illegitimate children as a result of the recent United States Supreme Court ruling in *Stanley v. Illinois*.[41] The Court held that the father of an illegitimate child was entitled to a due process hearing on fitness before his child could be removed from custody as a dependent child under the Illinois Juvenile Court Act. The Court said that the state could not presume the father's unfitness because his child was illegitimate and could not refuse him a hearing on his rights to custody. The *Stanley* decision thus has a great impact on adoption cases involving illegitimate children. Previously, section 9.1-8 of the Illinois Adoption Act provided that consent to adoption need not be obtained from a putative father.[42] According to the Illinois Attorney General, as a result of *Stanley*, consent must now be obtained from both the father and the mother of the illegitimate child and a non-consenting or an unknown parent must be made a party defendant in any adoption proceeding.[43] If the putative father refuses to consent, is unavailable, or cannot be identified, it will be necessary to allege that he is an unfit person on one of the grounds defined in the Adoption Act. In the typical case involving the father of an illegitimate child, the ground alleged would be abandonment. However, Illinois courts are likely to continue to require firm proof of abandonment in such cases. In order to prove abandonment, it would first have to be shown that the father knew of the child's existence and that he had a reasonable chance to decide if he intended to abandon him. Personal service should be used whenever possible, but notice by publication will be required when the father or his whereabouts are unknown.[44] Thus, it is apparent that the *Stanley* case has further complicated the termination of parental rights. It will most certainly result in delays and put the finality of many adoption decrees in doubt.[45]

No matter what type of present state statute governs a case of termination of parental rights, "[i]n all such cases the crucial factor should be the child's welfare, both material and psychological, considering in particular the ties of affection he has formed and the consequences of breaking those ties."[46]

App. 2d 412, 218 N.E.2d 820 (1966); Thorpe v. Thorpe, 48 Ill. App. 2d 455, 198 N.E.2d 770 (1964); Houston v. Brackett, 38 Ill. App. 2d 463, 187 N.E.2d 545 (1963).

41. 405 U.S. 465 (1972). *See* Hession, *Adoptions After "Stanley"—Rights for Fathers of Illegitimate Children*, 61 Ill. B.J. 350 (1973).

42. Ill. Rev. Stat. ch. 4, § 9.1-8 (1971).

43. 1972 Op. Att'y Gen. 542 (1972).

44. Ill. Rev. Stat. ch. 37, §§ 704-3, 704-4 (1971).

45. 61 Ill. B.J. 378 (1973). *See also* Kleinman, *Nightmare With Real Victims*, Chicago Tribune, December 4, 1972, § 2 (Features), at 17, col. 1; *id.*, December 5, 1972, § 2, at 1, col. 1.

46. Clark, *supra* note 14, at 631. *See also* In re E., 239 A.2d 626 (Del. 1968), which held that the best interest of the child is the primary consideration in parental termination cases. The child had lived with the foster parents for all of her eight years, and the mother had only visted the child once. The court held that the mother had abandoned the child and that the termination of parental rights was in the best interest

V. Agencies Versus Foster Parents

The courts rely heavily on social service agencies to provide foster placement for children and agencies are given great discretion in making custodial dispositions. Generally, courts have neither the time nor the facilities to supervise agency placements and it is only when a person has been rejected as a qualified custodian that courts have an opportunity to review agency practices.[47] Many times the courts are called upon to resolve the conflict that arises when foster parents challenge the decisions of agencies which have disqualified them from continuing to have custody of or adopting their foster child.

It has been suggested that a justification for court decisions which deny foster parents the custody of their foster children in such disputes is the need to preserve the foster home system. The reasoning is that if foster parents are allowed to violate their agreements with the agency to return the children on demand and, if they are thereby able to acquire children for adoption, the agency will no longer be able to make temporary placements in foster homes.[48] However, this reasoning is questionable because determinations of whether to allow the foster parents to adopt should be made on a case-by-case basis, taking into consideration the circumstances of each situation. If it is apparent the foster child will remain in long-term foster care and will not be returned to his parents, foster parents should be allowed to adopt if they so desire.[49] Such decisions in these particular cases should not interfere with or jeopardize situations where only temporary placements are required.

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of the child, in order to facilitate adoption by the foster parents.

In a recent Iowa case, In re McDonald, — Iowa —, 201 N.W.2d 447 (1972), the state supreme court upheld the termination of the parental relationship upon the grounds that the low I.Q.s of the parents made them unable to give their children proper care and attention (the mother's I.Q. was 47, and the father's was 74). The statute relied upon by the court stated that the parental relationship could be terminated if the court finds "[t]hat the parents are unfit by reason of debauchery, intoxication, habitual use of narcotic drugs, repeated lewd and lascivious behavior, or other conduct found by the court likely to be detrimental to the physical or mental health or morals of the child." Iowa Code Ann. § 232.41(d) (1969). *See also*, In the Matter of Stephen B., 60 Misc. 2d 662, 303 N.Y.S.2d 438 (1972), where the court terminated the parental rights of a mentally unstable mother, based on the New York permanent neglect statute.

47. Katz, *supra* note 28, at 145.

48. Clark, *supra* note 14, at 597.

49. Several years ago, forward-looking agencies began to accept the notion that children hard to place for adoption may become attractive as adoptive children to those foster parents who had cared for them on a boarding basis and that the transition should be facilitated. Also, there are potential adoptive parents who quite naturally hesitate about adopting children with physical and mental-emotional handicaps, or with racial-ethnic backgrounds other than their own. In such instances, a period of mutual experience in a foster care arrangement may be useful in itself and may also provide the basis for a realistic adoption decision.

Kahn, *supra* note 12, at 473.

In many cases, by denying foster parents the right to custody by adoption, courts have disregarded the best interests of the children. All too often the courts have allowed the welfare of the child to be subordinated to strict principles of contract law or to the notion that the integrity and power of the agency must be upheld. For example, *In re Jewish Child Care Association of New York*,[50] involved the struggle of foster parents to adopt a five-year-old girl who had been in their care since she was thirteen months old. The child's mother was a young unmarried girl. The foster parents had been required to sign a document which provided, in part, that they promised to cooperate with the agency's plan for continuing a relationship with the child's natural parents, that they acknowledged they were accepting the child for an indeterminate period, and that they were aware the legal responsibility for the child remained with the agency. The foster parents became very attached to the child and repeatedly requested to be allowed to adopt her. The agency demanded the return of the child and brought a habeas corpus action against the foster parents when they refused to give up the child. Despite the fact that the mother did not request the return of the child, did not appear prepared to take her back, and saw her only twice in four years, the court upheld an order removing the child from the foster parents. (This case was decided before the New York permanent neglect statute was in effect.) From the majority opinion in this four-to-three decision, it is apparent that the chief considerations of the court were the traditional concepts of the paramount nature of the natural parent's rights[51] and that the integrity of the law (as manifested in the placement contract and in the agency's administrative decision) had been challenged.[52] The result of this case seems almost to punish the foster parents for loving the child too much. Also, it appears that in this decision the best interests of the agency, not the child, were served. The child was placed in two other homes in a two-year period following the decision.[53] Thus, the outcome was plainly in contradiction to the established aim of child welfare, which is to provide a stable family relationship for such children.

In *Marchese v. New York Foundling Hospital*,[54] the foster parents sought to adopt their foster child, who had lived with them for four years. The agency reclaimed the child after the foster parents requested permission to adopt her. The foster parents had been named as the child's guardian

50. 5 N.Y.2d 222, 183 N.Y.S. 2d 65, 156 N.E.2d 700 (1959).

51. "What is essentially at stake here is the parental custodial right. Although Child Care has the present legal right to custody . . . it stands, as against the Sanders, in a representative capacity as the protector of Laura's mother's inchoate custodial right and the parent-child relationship which is to become complete in the future." *Id.*, at 228, 183 N.Y.S.2d at 69, 156 N.E.2d at 703.

52. "[T]he program of agencies such as Child Care . . . may not be subverted by foster parents who breach their trust." *Id.*, at 230, 183 N.Y.S.2d at 71, 156 N.E. 2d at 704.

53. J. Goldstein & J. Katz, The Family and the Law 1033-34 (1965).

54. 53 Misc. 2d 234, 278 N.Y.S.2d 512 (1967).

in a deed of guardianship executed by the natural parents, but the court ordered that the child be returned to the agency to be placed elsewhere for adoption.

> [T]he main reason for the decision seems to be that the foster parents in the placement contract with the agency had stipulated that the child was placed in the home "not with a view toward adoption," and that they agreed to return the child upon request which could be made at any time in the absolute discretion of the agency.
>
> It is shocking to find modern courts applying the conceptualistic principles of commercial law to the human problems involved in placement cases. There should be no covenant running with the child, and the child's actual best interest ordinarily should be decisive.[55]

In other cases involving custody disputes between foster parents and agencies, it has been held that the agency's decision is paramount, either on the basis of the placement contract (which usually provides that the foster parents will give up the child on request), or on the notion that foster parents have no legal right to custody.[56] However, there are also cases holding that the agency's decision is not to be given such undue weight and that the best interests of the child should prevail.[57]

In *Greco v. Chicago Foundlings Home*,[58] the Illinois Supreme Court affirmed the dismissal of habeas corpus action brought by prospective adoptive parents against an agency. The agency had placed an infant in the Greco's home for the purpose of adoption. A short time later the child was placed in a hospital for observation, but was then released. For no apparent reason, the agency refused to return the child to the foster parents and refused to consent to their adoption of her. The Grecos alleged that the agency arbitrarily detained the child and withheld its consent, that they were never given any reason for their disqualification, and that the administrator bore a malicious personal animosity towards them. The court, nevertheless, held that such allegations were insufficient to justify its intervention and said that under Illinois law the agency's consent is necessary before a child can be adopted. This seems to be an illustration of the view that the agency's deci-

55. Foster & Freed, *Family Law*, 19 Syracuse L. Rev. 479, 489-90 (1967).

56. Roussel v. State, 274 A.2d 909 (Me. 1971); Convent of Sisters of Mercy v. Barbieri, 200 Misc. 112, 105 N.Y.S.2d 2 (1950); *In re* Adoption of Johnson, 144 W. Va. 625, 110 S.E.2d 377 (1959); State *ex rel.* Action v. Flowers, 174 S.E.2d 742 (W. Va. 1970).

57. *See*, Kurtis v. Ballou, 33 App. Div. 1034, 308 N.Y.S.2d 770 (1970), which held that a hearing must be held to determine whether the removal of children from foster parents' custody by an agency is in the best interests of the children. In *In re* C.M.D., 256 A.2d 266 (Del. 1969), the Delaware Supreme Court held that an agency does not have the exclusive duty of deciding the best interests of a child placed in a foster home, and that the court must make its own determination of such interests in a custody proceeding. The California case of *In re* McDonald, 43 C.2d 447, 274 P.2d 860 (1954), held that the consent of the agency is not necessary in a proceeding by a foster parent to adopt a child.

58. 38 Ill.2d 289, 230 N.E.2d 865 (1967).

sion is controlling in such cases. The court did not even mention the best interest of the child. It is apparent that the welfare of the child was not served here because the child was placed in another foster home when she could have been adopted by the Grecos. The existing statute[59] requiring the agency's consent is a major obstacle to a court's ability to override an agency's decision. But if the disqualification of the prospective adoptive parents is purely arbitrary, it would seem that the courts would have the power, even under the present statute, to allow the adoption if it would be in the child's best interest.

In resolving disputes between agencies and foster parents seeking to retain custody or to adopt their foster children, the goals of child welfare would best be met by considering the welfare of the child in each case and by recognizing that foster parents and children do have a right to have their interests given equal weight to those of the agency. Where it appears that a child will be in foster care for a long period of time, with no hope of reunion with his natural parents, and where foster care is used to provide a temporary home for a child eligible for adoption, there should be no reason why fit foster parents should not be allowed priority in adopting their foster children.[60]

Instead agencies tend to impose contradictory roles upon foster parents, expecting them to be substitute parents, but to do so without forming emotional attachments.[61] Also, while asking that foster parents treat a foster child as they would their own, agencies attempt to maintain ultimate control over the foster family relationship. Agencies claim such control on the basis that a court has committed the child to them and that they are legally responsible and answerable to the court. However, in reality, the courts seldom review foster care placements.[62] The courts should take a more active role in determining whether foster parents should be deprived of custody when the agency so demands.

> Where the foster family provides a fit household and seeks to adopt, one of the primary purposes of foster home placement would be achieved by such an adoption. Since most foster children never are reunited with their natural parents and are never adopted, but instead are shunted about between foster homes or institutions, it is obvious that public policy should favor adoptions by fit foster parents. . . . It is hoped that there will be a reevaluation of the . . . decision in In re Jewish Child Care Association, and that placement agencies will abandon bureaucratic power struggles and concentrate upon the true best interests of the child. The fact that bonds of love and affection develop between foster

59. Ill. Rev. Stat. ch. 4, § 9.1-8 (1971).

60. One writer suggests that legal guardianship is the best solution for children in need of permanent or long-term foster care, who are not free for adoption or who have no prospective adoptive parents. Taylor, *Guardianship Or "Permanent Placement" of Children*, 54 Cal. L. Rev. 741 (1966).

61. *See, In re* Alexander, 206 So.2d 452 (Fla. 1968).

62. Katz, *supra* note 5.

parents and the foster child should be a factor for permanent placement, rather than the basis for removing the child from the foster home as in the Child Care Association case.[63]

VI. Proposals and Possible Solutions

From the differences of opinion and divergent results which are apparent in the case law concerning foster children, it appears that the best way to insure that foster parents are afforded a voice in proceedings involving their foster children is by legislative means. At the present time in Illinois, an attempt is being made to extend the rights of foster parents through proposed amendments to the Juvenile Court Act. These bills have already been unanimously approved by the Illinois Senate, and passage is expected shortly in the House. One bill[64] would amend section 701-20 of the Juvenile Court Act and would require that the foster parents of any neglected or dependent minor be given notice of all stages of any hearing or proceeding in which the custody or status of the minor may be changed. Another proposed amendment[65] would require that in every case where a child has been found neglected as a result of physical abuse, custody may not be restored to the parents until a court hearing is held to determine the fitness of the parents. These legislative proposals are a necessary beginning step in the recognition of the rights of foster parents and passage of them appears certain.

The Illinois Department of Children and Family Services plans to introduce further proposals to the legislature which would terminate the rights of natural parents after two years if they show little interest in their children who are in foster care. A children's rights bill will also be introduced which would give a child's wishes greater weight in the determination of such disputes. Such legislation is desperately needed in order to assure that the best interests of the child are served and it seems that Illinois is finally attempting to fill this need. This will help to prevent much of the heartbreak that so often occurs in custody cases involving foster children.

However, aside from these solutions which are being proposed in Illinois, further and more extensive legislation will be necessary to expand the rights of foster parents. A comprehensive set of laws designed to resolve the predicament of children in long-term foster care should be enacted. With the number of such children increasing, definite guidelines are needed so that they may be protected. This legislation should include a statute making foster parents who have had a child in their care for a long period (e.g., two years or more) parties to any custody proceeding concerning the child. This would give such foster parents legal standing to challenge any attempt to take the child away from them. Also, a comprehensive statute similar to

63. Foster & Freed, *supra* note 55, at 490.
64. S.B. 32, 78th Gen. Assem. (1973).
65. S.B. 33, 78th Gen. Assem. (1973).

the New York permanent neglect statute should be enacted.[66] This law is aimed directly at the child who is deserted in long-term foster care. Where there is no hope that he will be returned to his parents, or when the parents make no attempt to maintain contact with the child, parental rights should be terminated. By clearly defining the conditions under which parental rights may be terminated and by not leaving such conditions open to divergent judicial interpretation, this statute would free children for adoption and would end the uncertainty for them and their foster parents. An additional statute should be enacted, similar to one presently in force in New York, giving foster parents preference in the adoption of a child they have taken care of for two years or more. The agency's consent to adoption by foster parents should not be an absolute prerequisite if the court finds that the foster parents are fit to adopt the child and that such adoption would be in the child's best interest. This would eliminate the problems which arise when an agency arbitrarily refuses to allow the adoption on the basis of the foster placement contract or other grounds.

Statutes calling for more court intervention in foster child cases are also needed. One suggestion would be a law requiring that placement of children away from their homes may be extended only on regular judicial review.[67] In this way, the court may order that a permanent home be found for the child instead of allowing placement to continue indefinitely. Court approval should also be required before any child who has lived with his foster parents for a long period can be removed from their custody. The courts should consider the best interest of the child above all, weighing such factors as the child's wishes, the length of time he has lived with the foster parents, his relationship to them, the degree of contact maintained with the natural parents, and other relevant circumstances. Courts should be reluctant to interfere with the custodial interest of foster parents who have cared for a child for a long period of time. If a natural parent seeks to interfere with the foster relationship, he should be required to prove that the foster parents are unfit and that the best interests of the child demand a change in custody.

Rather than blindly holding that the rights of natural parents and agencies are paramount, the trend clearly appears to be in the direction of expanded recognition of the interests of children and their foster parents. This is certainly a more enlightened approach, especially in view of the fact that human emotions are so deeply involved in these cases. As one caseworker said, the problem is the legal definition of a parent: "Is the parent the one who brings life into the world or the one who assumes the responsibilities of

66. For a suggested model statute of this type, *see* Gordon, *supra* note 31, at 261-62.

67. N.Y. Fam. Ct. Act §§ 355(b), 355(c), 756(b), 756(c) (McKinney 1963); *See In re* Bonez, 48 Misc.2d 900, 266 N.Y.S.2d 756 (1966), in which the court refused to approve extended placement and ordered that a permanent home be sought for the child.

raising the child?"[68] The rights of natural parents to their children are indeed paramount, until the standard of care they provide falls below that which society has set as an acceptable minimum. Once the parent has failed to fulfill his minimum duty of care, the courts must intervene to remove the child. It is then that the primary and controlling consideration should be the best interest of the child, rather than parental rights. In order to accomplish this, it is necessary to broaden foster parents' rights to insure that a child who has become a part of their family will not be taken away. Surely, those who have raised a child for years may be considered parents and may be placed on an equal footing with those who brought the child into the world but failed to provide him with adequate care.

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68. Keegan, *Children Are Losers in Custody Battles*, Chicago Tribune, March 21, 1973, § 1C, at 6, col. 1.